Remarks

The Final Office Action mailed 21 March 2006 has been received and reviewed. Claims 1, 4-5, 14, and 17-18 have been amended. Claims 2-3 and 15-16 have been cancelled. Therefore, the pending claims are claims 1, 4-14, and 17-26. Reconsideration and withdrawal of the rejections are respectfully requested in view of the amendments and the remarks provided herein.

The Examiner maintains all previous rejections from the office action dated 25 August 2005. In other words, the Examiner continues to reject claims 1-7 and 14-20 under 35 U.S.C. §103 as being unpatentable over Stauffer et al. (Adaptive background mixture models for real-time tracking", Proceedings 1999 IEEE Conference on Computer vision and Pattern Recognition, Fort Collins, Col., 1999 June 23-25; 2:246-252) in view of Menon et al. (U.S. Patent No. 5,537,488); and further the Examiner continues to reject claims 8-10 and 21-23 under 35 U.S.C. §103(a) as being unpatentable over Stauffer in view of Sacks (U.S. Patent No. 4,739,401), and also in view of Menon et al; claims 11-12 and 24-25 under 35 U.S.C. §103(a) as being unpatentable over Stauffer in view of Baxter (U.S. Patent No. 5,966,074), and also in view of Menon et al.; and claims 13 and 26 under 35 U.S.C. §103(a) as being unpatentable over Stauffer in view of Uyttendaele (U.S. Patent No. 6,701,030), and also in view of Menon et al.

Applicant continues to respectfully traverse such rejections. However, to move the case to issuance, Applicant has amended the claims to clearly overcome the Examiner's rejections. Further, Applicant provides the following comments regarding the Examiner's Response to Arguments, and provide additional remarks regarding the patentability of the pending amended claims.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art references must teach or suggest all the claim limitations. *See* M.P.E.P. § 2143.

Contrary to the Examiner's Response to Arguments, there is no motivation to combine the references as alleged by the Examiner. The lack of motivation is clearly presented in the remarks provided in response to the Office Action dated 25 August 2005 which are incorporated herein by reference and which are deemed sufficient to overcome the rejection set forth by the Examiner.

Applicant continues to point out that for the Examiner to allege that an isolated step from the training process of Menon et al. to be inserted into the real time foreground and background segmentation process of Stauffer et al., there must be motivation or suggestion to make such a modification. The present invention solves an unrecognized problem in the prior art to provide a substantially improved process. To allege that one skilled in the art would be motivated to make the modification as alleged by the Examiner is engagement in impermissible hindsight reconstruction of the claimed invention.

In other words, as recently asserted in *Princeton Biochemicals, Inc. v. Beckman Coulter, Inc.* 411 F.3d 1332, 75 U.S.P.Q.2d 1051 (Fed. Cir. 2005), 35 U.S.C. §103 specifically requires an assessment of the claimed invention "as a whole." The "as a whole" assessment of the invention requires a showing that an artisan of ordinary skill in the art at the time of the invention, confronted by the same problems as the inventor and with no knowledge of the claimed invention, would have selected the various elements from the cited references and combined them in the claimed manner. In other words, 35 U.S.C. §103 requires some suggestion or motivation, *before the invention itself*, to make the new combination. See *In re Rouffet*, 149 F.3d 1350, 1355-56, 47 U.S.P.Q.2d 1453, 1457-58 (Fed. Cir. 1998) (*Emphasis added).*

This "as a whole" instruction in 35 U.S.C. §103 prevents evaluation of the invention part by part. Without this important requirement, an obviousness assessment might successfully break an invention into its component parts, then find a reference corresponding to each component. This line of reasoning would import hindsight into the obviousness determination by using the invention as a roadmap to find its prior art components. Further, this improper method would discount the value of combining various existing features or principles in a new

way to achieve a new result - often the essence of the invention. *Ruiz v. A.B. Chance Co.*, 357 F.3d 1270, 1275, 69 U.S.P.Q.2d 1686, 1690 (Fed. Cir. 2004). This is clearly the situation in the present matter where the attempt to match the update pixel value data for each pixel to each of all of the plurality of time varying distributions provided for the pixel provides a substantially advantageous process.

Simply identifying the various elements of a claim in the cited reference does not render a claim obvious. *Ruiz*, 357 F.3d at 1275. Instead, 35 U.S.C. §103 requires some suggestion or motivation in the prior art to make the new combination. *In re Rouffet*, 149 F.3d at 1355-56. Applicants submit that the Examiner has engaged in an improper part by part analysis of the claimed invention by selecting an isolated element of Menon et al. that is for a process substantially different than the real time foreground and background determination process of the present invention. Applicants submit that the requisite motivation to combine the teachings of the references to obtain the claimed invention, as a whole, is lacking.

However, to more clearly distinguish the present invention from the references cited, Applicant has amended claim 1 and 14 to indicate that a divergence measure is computed between the narrow distribution created for the pixel and each of all the plurality of time varying distributions provided for the pixel resulting in a plurality of divergence measures corresponding to the plurality of time varying distributions for the pixel; a minimum divergence measure of the plurality of divergence measures is determined; and the minimum divergence measure is compared to a predetermined cutoff to determine if a match exists or does not exist. Such limitations are not found in Stauffer et al. or Menon et al. (U.S. Patent No. 5,537,488); or any of the other cited references. As such, the references do not show all the limitations of such claims, and therefore, are not obvious in view thereof.

For at least the above reasons, the amended claims 1 and 14 are not obvious in view of the cited references.

The rejected claims 4-13 and 17-26 respectively depend on one of the independent claims 1 or 14, either directly or indirectly. Therefore, they include the limitations of the respective independent claim upon which they depend. either directly or indirectly. As such, these claims

are also not obvious in view of the cited references for the same reasons as provided above for the claim or claims upon which they depend, and further by reason of their own limitations.

Summary

It is respectfully submitted that the pending claims are in condition for allowance and notification to that effect is respectfully requested. The Examiner is invited to contact Applicants' Representatives, at the below-listed telephone number, if it is believed that prosecution of this application may be assisted thereby.

Respectfully submitted
By
Mueting, Raasch & Gebhardt, P.A.
P.O. Box 581415
Minneapolis, MN 55458-1415
Phone: (612) 305-1220
Facsimile: (612) 305-1228
Customer Number 26813

15 May 2006
Date

By: _____
Mark J. Gebhardt
Reg. No. 35,518
Direct Dial (612) 305-1216

CERTIFICATE UNDER 37 CFR §1.8:
The undersigned hereby certifies that the Transmittal Letter and the paper(s), as described hereinabove, are being transmitted by facsimile in accordance with 37 CFR §1.6(d) to the Patent and Trademark Office, addressed to **Mail Stop AF**, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450,
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By: Sandy Truehart
Name: